Supreme Court, U.S.
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No. 92-1498

In The

Supreme Court of the United States

October Term, 1992

SANDRA G. WILDER,

Petitioner,

v.

WARREN F. EBERHART, M.D. and
THE CONCORD CLINIC, INC.,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THIS CASE IS APPROPRIATE FOR REVIEW BECAUSE THE COURT OF APPEALS' FAILURE TO ADDRESS AND APPLY SUBSTANTIVE STATE LAW NOT ONLY IGNORES THIS COURT'S MANDATES IN *ERIE* AND *SALVE REGINA*, BUT CREATES CONFLICTS WITHIN THE FIRST CIRCUIT'S OWN OPINIONS 2

A. FEDERAL ISSUES 2

B. DECISIONAL CONFLICTS 5

II. THE CERTIFICATION ISSUE SHOULD BE REVIEWED AS IT POSES A NOVEL QUESTION IN LIGHT OF THE UNIQUE PROCEDURAL FACTS OF THIS CASE 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bishop v. Wood, 426 U.S. 341 (1976) 3, 4

Boucher v. Larochelle, 74 N.H. 433, 68 A. 870 (1908) ... 1, 5

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) ... 3, 4

Crawford v. Maine Central Railroad, 76 N.H. 29, 78 A. 1078 (1911) 1, 5

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 2, 5, 8

Larue v. National Union Elec. Corp., 571 F.2d 51 (1st Cir. 1978) 6

Lehman Bros. v. Schein, 416 U.S. 386 (1974) 7

Palmer v. Hoffman, 318 U.S. 109 (1943) 4

Propper v. Clark, 337 U.S. 472 (1949) 4

Saad v. Papageorge, 82 N.H. 294, 133 A. 24 (1926) ... 1, 5

Salve Regina College v. Russell, 499 U.S. ___, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) 2, 3, 4, 8

The Vessel M/V "Tungus" v. Skovgaard, 358 U.S. 588 (1959) 4

United States v. Durham Lumber Co., 363 U.S. 522 (1960) 4

Willey v. Ketterer, 869 F.2d 648 (1st Cir. 1989) 5

INTRODUCTION

The Respondents have attempted, as they did below, to draw this Court's attention away from the true issue in this case – the substance of the applicable state law which the Court of Appeals was duty-bound to examine and apply: Where the plaintiff's injury is the natural and probable result of the defendant's negligence, the *possibility* that something else may have caused the injury *is not an answer as a matter of law. See Crawford v. Maine Central Railroad*, 76 N.H. 29, 31, 78 A. 1078, 1079 (1911). *See also Boucher v. Larochelle*, 74 N.H. 433, 435, 68 A. 870, 871 (1908) (also discussed in Judge Loughlin's Order of December 13, 1992 denying Respondents' post-trial motions. See Petition, Appendix B, at B8-9); *Saad v. Papageorge*, 82 N.H. 294, 295, 133 A. 24, 25 (1926).[1]

These cases expressly and succinctly describe the quality of evidence required of the Respondents to fulfill their burden of production (not proof, as the Respondents have claimed) where they have elected to defend against the plaintiff's prima facie case by offering other causes of the Petitioner's injury. As Mrs. Wilder's case law amply demonstrates, the defendants' burden of production in this case is not satisfied by the introduction of other possibilities. She submits that the Respondents' failure to

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[1] Contrary to the Respondent's claim on page 5 of their Brief in Opposition, Judge Loughlin, in light of this rule of law, did in fact specifically comment on the confusion engendered by the jury having to draw a distinction between probabilities and possibilities ranked in ascending order of probability during the hearing on Mrs. Wilder's Second Motion in Limine. *See* Brief in Opposition, at App. 16.

address this law and these cases at any time in their argument, either here or below, is their concession that they cannot prevail if this law is applied in this case.

It is no small irony, therefore, that the Respondents open their Brief in Opposition with an explication of this Court's ruling in *Salve Regina College v. Russell*, 499 U.S. ___, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991), which mandates a *duty* on the part of the Court of Appeals to supply a meaningful *de novo* review of the state law issue – something which never took place in the case at bar.

I. THIS CASE IS APPROPRIATE FOR REVIEW BECAUSE THE COURT OF APPEALS' FAILURE TO ADDRESS AND APPLY SUBSTANTIVE STATE LAW NOT ONLY IGNORES THIS COURT'S MANDATES IN *ERIE* AND *SALVE REGINA*, BUT CREATES CONFLICTS WITHIN THE FIRST CIRCUIT'S OWN DECISIONS.

A. FEDERAL ISSUES

As set out in Mrs. Wilder's Petition, the important questions of federal law are apparent from the Court of Appeals' failure to abide not only by this Court's mandate in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), requiring federal courts sitting in diversity to apply state substantive law on issues dispositive of the case, but also of its failure to determine that substantive law, as required by *Salve Regina*, through a meaningful *de novo* review of the state law issue.

In arguing the Court of Appeals' fulfillment of the mandate in *Salve Regina*, the Respondents assert, in essence, that not only is the Court of Appeals free to

choose that law which it shall consider in its *de novo* review, but that this Court, "in determining whether it should choose to expend its limited resources in the exercise of discretionary jurisdiction," (Brief in Opposition at 6), should defer to the Court of Appeals' state law determination.[2] *Citing Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). In fact, the Respondents refer to *Bishop v. Wood*, 426 U.S. 341 (1976), for the proposition that deference is appropriate even "if an examination of the state law issue without such guidance might have justified a different conclusion." *See id.* at 346. (Brief in Opposition at 7).

The Court in *Bishop* makes this statement, however, in light of the fact that the Court of Appeals had affirmed the District Court's interpretation of the state ordinance at issue, in the absence of any authoritative interpretation of that ordinance by the state court, thus making deference to that court's state law determination *in that case* all the more appealing. This is not the situation presented herein. The issue here is not the interpretation of a state statute, but rather New Hampshire common law. In this

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[2] Albeit new on the bench at the time this case was heard, the Respondents have also invited this Court, in deferring to the Court of Appeals' ruling, to be comforted by the qualifications of Judge Stahl in having served two years and three months on the federal District Court, and on his practice of law. Although *Salve Regina* precludes deference to Judge Loughlin's ruling on state law, Mrs. Wilder submits that if experience with New Hampshire law is a relevent issue here, this Court should similarly consider his thirteen years on the federal District Court bench, his sixteen years on the State Superior Court (resigning as Chief Justice thereof), his having sat by designation on the state Supreme Court, and his practice of law as a trial attorney.

case the Court of Appeals rejected, not upheld, the District Court's interpretation of that law. Moreover, unlike the situation in *Bishop*, there exists unambiguous decisional law of New Hampshire's highest court specifically interpreting this rule of substantive law.

It is clear that under *Salve Regina* this Court retains the discretion to determine whether or not to rely on the lower court's determination of state law. *See Salve Regina*, 499 U.S. at ___ n.3, 113 L. Ed. 2d at 200 n.3. (responding to criticisms of the dissent). Still, *Brockett* emphasizes that there is no "ironclad" rule of deference and that the Court is free to differ with the lower court as to the meaning of state law. 472 U.S. at 500. As the Court points out therein, this is true where the lower court has committed "plain error," *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); where the view of the court is "clearly wrong," *The Vessel M/V "Tungus" v. Skovgaard*, 358 U.S. 588, 596 (1959); "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960); or "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). *Brockett*, 472 U.S. at 500 n.9. Any one of these reasons would apply in the case at bar.

Just as a thorough examination of *Salve Regina*, *Bishop*, and *Brockett* reveals the incomplete interpretation given them by the Respondents, a similar examination of their reliance on the other state cases they have cited reveals a misleading emphasis on the Petitioner's burden of proof, and on an evidentiary certainty standard that simply does not exist in New Hampshire. *See* Brief in Opposition, at 8-9. Despite this, Mrs. Wilder, in her appellate court brief, analyzed and distinguished each and every case proffered by the Respondents in support of their position. Moreover, in so doing, she substantiated

her position with on-point New Hampshire case law which neither the Respondents nor the Court of Appeals have even acknowledged. *See supra, Crawford, Boucher,* and *Papageorge*. These cases squarely address the real issue in this case – the quality of evidence required of the Respondents when opting to defend, against a prima facie case, by offering other causes of the plaintiff's injury.

Mrs. Wilder submits that in light of the authorities of this Court and of the New Hampshire Supreme Court discussed above, no person should suffer the loss of a jury verdict fairly won through such a cavalier examination of both the record and of the pertinent substantive law.

B. DECISIONAL CONFLICTS

Mrs. Wilder submits that this Court should intervene to enforce the mandate of *Erie*, particularly when the Court of Appeals has construed substantive state law that is determinative of the action in a way that conflicts with previous decisions of that court.

One such case upon which Mrs. Wilder relies, and which the Respondents avoid discussing, is *Willey v. Ketterer*, 869 F.2d 648 (1st Cir. 1989), also a New Hampshire diversity medical malpractice case. Therein, Judge Aldrich strongly criticized defendant's counsel for attacking the plaintiff's prima facie case by offering an expert medical opinion that amounted to a mere possibility that the plaintiff was genetically predisposed to cerebral palsy, and that the palsy was, therefore, not caused by the defendant-physician during the plaintiff's birth. Failure

of counsel to establish, through expert medical testimony, that genetic predisposition was the probable cause of the plaintiff's injury and not just compatible with it, *see id.* at 651, caused Judge Aldrich to hold that its admission was harmful error. *Id.* at 652.

Another First Circuit case on point is *Larue v. National Union Elec. Corp.*, 571 F.2d 51 (1st Cir. 1978). *Larue* is a products liability case wherein the Court of Appeals upheld the trial court's striking of defendant's expert medical testimony after said expert conceded that the manner in which the plaintiff was injured, as he originally testified, was *not probable*. The fact that the same rule of law applies in products liability actions demonstrates not only its general applicability, but also the pervasive effect the Court of Appeals' decision in this case will have on all cases wherein expert testimony is necessary because of the complexity of the subject-matter.

The Court of Appeals' decision in this case is incompatible with these prior decisions, and the resulting harm to Mrs. Wilder and future litigants gives rise to the need for this Court to exercise its supervisory authority to settle the conflict in accordance with state common law.

II. THE CERTIFICATION ISSUE SHOULD BE REVIEWED AS IT POSES A NOVEL QUESTION IN LIGHT OF THE UNIQUE PROCEDURAL FACTS OF THIS CASE.

In denying Ms. Wilder's request for certification of the state law issue to the New Hampshire Supreme Court, the Court of Appeals ruled that the request came too late as it should have been made at the District Court.

It was further held that certification would amount to an appeal of its decision to the state court. In so holding, the court also went beyond the accepted and usual course of judicial proceedings and precluded certification of the state law question on remand to the District Court. *See* Petition, Appendix A, at A8. As a result, Judge Loughlin recused himself from further participation in the case.

Although certification at the appellate level would have saved Mrs. Wilder, and all others involved, the great burden of pursuing a second trial, the Court of Appeals' mandate precluded, on remand, anyone from confirming what the law of the case really is – what Judge Loughlin aptly referred to as the "quietus." *See* Order of Recusal, Petition, Appendix B, at B12.

As a practical matter, this holding precludes a party, like Mrs. Wilder, who *succeeds* on the state law issue at trial, from having any access to the certification process should that state law determination be overturned on appeal. Ms. Wilder had no need to request certification below. Her need for certification accrued only after the Respondents appealed to the First Circuit on the state law issue and won.

Ms. Wilder concedes the discretionary nature of certification. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Still, the Respondents neglected to acknowledge that in *Lehman Bros.* this Court lauds the certification process as a means of saving time, resources, and of encouraging "a cooperative judicial federalism." *Id.* at 390-91. These benefits should not be treated as empty virtues – particularly in a case such as this where certification would most likely be dispositive of the case.

CONCLUSION

Ms. Wilder chose to pursue this case in the federal court, and she is willing to accept the result of a fair trial and a sound, well-reasoned decision on appeal. But when a jury verdict in her favor is taken away on appeal without consideration for unambiguous state law precedent (which now cannot be argued on remand) and without material explanation or analysis, in violation of this Court's mandates in *Erie* and *Salve Regina*, she has been unjustly deprived of a meaningful opportunity to obtain relief. Mrs. Wilder submits that the injustices presented in this case are the type for which this Court's Certiorari jurisdiction was designed to address.

By reversing the Court of Appeals' judgment and reinstating the jury's verdict, this Court could correct the *Erie* problem created by the Court of Appeals, confer substantial justice upon the Petitioner, and avoid the needless expenditure of time and resources which would otherwise be made necessary by a new trial.

For the reasons set forth herein, the Petitioner, Mrs. Wilder, respectfully requests that her Petition for a Writ of Certiorari be accepted.

Respectfully submitted,

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